BC EST #D222/00
Reconsideration of BC EST #D033/00

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an application for reconsideration pursuant to Section 116 of the

Employment Standards Act R.S.B.C. 1996, C.113

- by -

Zep Manufacturing Company of Canada

- of a Decision issued by -

Employment Standards Tribunal
("Tribunal")

ADJUDICATOR: April D. Katz

FILE No.: 2000/176

DATE OF DECISION: June 5,2000

DECISION

APPEARANCES:

For the Employee	Angie Fielding by Written Submission
For the Employer	Gary Dionne by Written Submission
For the Director	No submissions were received

OVERVIEW

This is an Application from the Employer, Zep Manufacturing Company of Canada ("Zep") for reconsideration of Employment Standards Tribunal Decision No: D033/00 issued on February 4, 2000 by Adjudicator Thornicroft. Angie Fielding (then "Mackenzie") brought a complaint to the Director that her employment with Zep was terminated in March 1999 because she was pregnant.

The Tribunal Decision found that the burden is on an employer to show the pregnant employee's employment was not terminated due to the pregnancy under section 54 (2)(a) of the Act. He found that Zep had not discharged this burden and was liable to Ms. Fielding for her $8,800 loss of income from March 1999 until the arrival of her child in July 1999.

In Determination ER # 82-557 the Director's delegate indicated that she did not accept Ms. Fielding's claim that her employment was terminated by reason of her pregnancy contrary to section 54(2)(a) of the Act. The delegate determined that Zep did not have just cause to terminate Ms. Fielding's employment. The delegate found that Zep had paid 1 week's wages as compensation for length of service under section 63 of the Employment Standards Act ("Act"). She decided that Zep had fully discharged its pecuniary obligation to Ms. Fielding the end of her employment.

This reconsideration proceeded by way of written submission. The Director's delegate wrote to say that the Determination stood on its own merits and took no position.

ISSUE TO BE DECIDED

The issue to be decided is whether the Employer has met the burden for establishing that grounds for reconsideration of Decision # D033/00 exist.

REQUEST FOR RECONSIDERATION

In his letter of March 15, 2000, Mr. Dionne sets out five reasons for the reconsideration to be granted. They are as follows:

1. The director's delegate was unable to attend the Tribunal to prove her testimony.

2. Zep was not informed by Zep's legal counsel that witnesses were permitted and would now like to call witnesses

3. Veronica Harkema, the direct supervisor, was not able to attend the Tribunal to corroborate Mr. Dionne's assertions

4. Ms. Fielding advised Ms. Hakema of her pregnancy 2 weeks after her start date of November 9, 1998, i.e. November 23, 1998 as opposed to early December as stated by Ms. Fielding. 'The Adjudicator, Kenneth Wm. Thornicroft, states that "There is some evidence in the employer's own documents which suggests that MacKenzie (now Fielding) termination was related to her pregnancy." "there is a reference to MacKenzie leaving work early, and calling in sick on the other days, due to her pregnancy." The adjudicator has placed his own bias on this statement. Ms. Fielding stated many times to other employees that she "couldn't be fired because she was pregnant." The excessive sick time was proof of her taking advantage of the fact she was pregnant. Ms. Fielding's performance deteriorated significantly due to the fact she believed her position secure, in spite of her poor work performance, because she was pregnant. The adjudicator believed Ms. Fielding was dismissed based on her pregnancy despite documentation supporting poor work performance."

5. "The newspaper advertisement that Zep was looking to replace Ms. Fielding in mid-January is not evidence of termination due to pregnancy. When Ms. Fielding's position was advertised, it was two months before we found a candidate for the position. Many people were interviewed before a suitable candidate was found. Zep needed to be prepared to replace two temporary employees and needed sufficient time to train two people. In the event that one of the temporary persons was unable to handle the position another candidate would be needed. In fact Zep required two months before Ms. Fielding's maternity leave to prepare the new employee to take on the temporary position."

THE LAW

Pregnancy

In Part 6 of the Act, employees are entitled to certain unpaid leaves including pregnancy leave. An employer is not permitted to terminate an employee because of her pregnancy under section 54 (2), which states:

> 54 (2) An employer must not, because of an employee's pregnancy or a leave allowed by this Part, terminate employment...

If a pregnant employee is terminated, it is the employer's burden to show that the pregnancy was not the reason for discharge under section 126 (4), which provides:

> 126(4) The burden is on the employer to prove...
>
> (b) that an employee's pregnancy, a leave allowance by this Act or court attendance as a juror is not the reason for terminating the employment or for changing a condition of employment without the employee's consent.

Where an employer is unable to discharge its burden of proving that an employee's pregnancy was not the reason for her termination, various remedial options are open to the Director under section 79 which states:

> 79(4) In addition, if satisfied that an employer has contravened a requirement of section 8 or Part 6, the director may require the employer to do one or more of the following:
>
> (a) hire a person and pay the person any wages lost because of the contravention;
>
> (b) reinstate a person in employment and pay the person any wages lost because of the contravention;
>
> (c) pay a person compensation instead of reinstating the person in employment;
>
> (d) pay an employee or other person reasonable and actual out of pocket expenses incurred by him or her because of the contravention.

Reconsideration

Tribunals have written extensively about the basis for a reconsideration. Section 116 of the Act states:

> 116(1) On application under subsection (2) or on its own motion, the tribunal may:
>
> (a) reconsider any order or decision of the tribunal, and
>
> (b) cancel or vary the order or decision or refer the matter back to the original panel.

The power to reconsider orders and decisions under Section 116 is a discretionary power that is exercised with caution. The Tribunal has adopted limited grounds for reconsideration of decisions. Those grounds include

(a) a failure by an adjudicator to comply with principles of natural justice;

(b) where a mistake of fact has been made;

(c) where a decision is inconsistent with other decisions not distinguishable on the facts;

(d) where significant and serious new evidence has become available that had such evidence been presented to the adjudicator it would have lead the adjudicator to a different conclusion;

(e) serious mistake in applying the law;

(f) misunderstandings or failure to deal with a significant issue; and

(g) a clerical error in the decision.

The purpose of the Act is "to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act", section 2(d). Allowing more than one hearing in a matter turns extends the proceedings and delays the remedy or resolution of the complaint. The Tribunal's authority is limited to confirming, varying or canceling a determination, or referring a matter back to the Director of Employment Standards under Section 115. The above reasons imply that a degree of finality is desirable. (See Re: Kiss BC EST # D122/96; Re: Pacific Ice Company BC EST # D241/96; Re: Restaurontics Services Ltd. BC EST # D274/96; and Re: Khalsa Diwon Society BC EST # D199/96).

The purpose of the Act is to facilitate the quick, efficient and inexpensive adjudication of complaints. It has been stated that the reconsideration power should be used sparingly and only in exceptional cases. (See World Project Management Inc. BC EST # D134/97; Re: Allard BC EST # D265/97).

The criteria for exercising the discretion to reconsider a decision was stated in Re: Milan Holdings Ltd., BC EST #D313/98. In Milan Holdings, the Tribunal set out a two-stage process for analyzing requests for reconsideration. The first stage is to decide whether the matter raised in the application for reconsideration warrants a second examination. In deciding this question, the Tribunal considers whether the focus of the request for reconsideration is to have a second panel effectively re-examine the evidence presented to the adjudicator in the first decision. The primary factor weighing in favour of a reconsideration is whether the applicant has raised significant questions of law, fact, principle or procedure of sufficient merit to merit reconsideration. Reconsideration will not be used to allow a "re-weighing" of evidence or the seeking of a "second opinion" when a party simply disagrees with the original decision. (See Wicklow Properties Ltd., et al., BC EST #D518/99)

FACTS

The facts well covered in the Determination and the Decision.

> "During the course of the delegate's investigation, Zep maintained that Fielding was terminated for cause, primarily, poor work performance. The Determination reads, in part, as follows (at pp. 3-4):
>
> > "...the employer states that Angie Fielding was not terminated due to her pregnancy, rather, she was terminated for just cause [namely] not completing the work assigned to her and using foul language in the work place, issues she had received previous warnings about...
> >
> > In reviewing all the evidence before me, I can not [sic] find that the complainant was fired due to her pregnancy. However, I also do not find that the employer had 'just cause' to fire the employee. In reviewing all the documentation supplied, no where does it indicate that if the complainant's performance did not improve that she would be terminated. Nor does the documentation indicate that if the complainant used foul language in the work place, she would be terminated. All the documentation states is that

> the complainant would be held fully accountable for meeting project guidelines established when she first began working there. The employer did pay the complainant $507.20 one-week's compensation for length of service pay upon termination. Accordingly, the employer does not owe any additional wages to the employee."

Zep manufactures and distributes specialty chemicals including cleaning supplies used by hotels and other commercial enterprises. During the relevant period, there were a dozen or so sales representatives, 2 or 3 warehousemen and 2 office clerks (one of whom being Ms. Fielding) employed at Zep's local Delta office/warehouse.

MacKenzie's [sic Fielding's] Evidence

Ms. Fielding testified that she was originally hired, in early November 1998, after being interviewed by Mr. Dionne and the office manger (and her direct supervisor), Ms. Veronica Harkema ("Harkema"), and worked as an accounts receivable/payable clerk from November 9th, 1998 until her termination on March 10th, 1999. Her monthly salary was $2,200.

In early December 1998, Ms. Fielding learned that she was pregnant and so advised Harkema. At about the same time, the only other clerk in the office also advised the employer that she was pregnant and intended to take maternity leave. Fielding's employment continued without incident until mid-January 1999 at which time, her concern piqued by an employment advertisement placed by the employer in a local newspaper, she spoke with Harkema who advised that since the only two clerical staff in the office both planned to take maternity leave, one would have to be let go.

Fielding indicated to Harkema that the employer could not terminate her because she was pregnant but Harkema apparently stated that the employer "did not need a reason" for termination inasmuch as Fielding was a probationary employee (Fielding concedes that she was hired on the basis of an initial 3-month probationary period). Dionne also apparently told Fielding that she could be terminated because she was still on probation. Fielding denies having ever received the verbal or written warnings particularized in the Determination (at p.2). Fielding's last working day was March 3rd; she was away from work for one week to get married and upon her return on March 10th was terminated by Harkema.

It had been MacKenzie's intention to work throughout her pregnancy until shortly before her due date; her baby was born on July 30th, 1999 (but was due a week later) and thus Fielding seeks 4 1/2 months' lost wages based on her monthly salary of $2,200.

Dionne's Evidence

Dionne testified that he made the decision to hire Fielding on the strength of her interview and "great résumé"; according to Dionne "she seemed pleasant and I

thought she could do the job". However, over the course of time, Dionne says he discovered that Fielding would not accept "constructive criticism" and that "she did not get along with people at work". Dionne testified that "generally, the salesmen did not like her attitude"; "customers complained"; Fielding was "rude" when following up on unpaid accounts. Dionne says that Fielding received verbal warnings on January 13th, 25th and 27th, 1999--warnings that are particularized in a "Performance Correction Notice" presented to Fielding on February 12th, 1999. Appended to this latter "Notice" is a letter to Fielding which purports to extend Fielding's probation period by one month. According to Dionne, Fielding refused to sign the Notice (the space for her signature is left blank) and in an "aggressive" tone refused to even look at the Notice, or the attached letter, and maintained her position that she could not be terminated "because she was pregnant"

Dionne was on holidays when Harkema fired Fielding but Dionne says that he nonetheless authorized the termination. Dionne testified: "We could have fired her after her probation was up but carried it on; I was willing to pay severance and we did". Dionne testified that Zep's original intention was to have both clerks take maternity leave and then return to work; to that end, advertisements were placed to obtain temporary replacement employees. Dionne adamantly maintained that Fielding was terminated, not because of her pregnancy but, rather, due to her "poor attitude", her conflictual interactions with staff and clients and because "there was no future for her with the company".

ANALYSIS

Zep raised 5 points to be considered in this reconsideration.

1. “The director’s delegate was unable to attend the Tribunal to prove her testimony.”

The role of the delegate at a Tribunal hearing is not ‘to prove her testimony’. The delegate may attend the Tribunal and participate but attending a tribunal hearing is discretionary and not required for the Tribunal to proceed.

2. Zep was not informed by Zep’s legal counsel that witnesses were permitted and would now like to call witnesses.

Zep was made aware of its ability to seek guidance on the Tribunal process from the Tribunal in the material attached to the Determination. Zep had counsel to assist it with these proceedings. If counsel failed to prepare their evidence thoroughly then there are issues between counsel and Zep but it is not a basis for revisiting the Decision.

3. Veronica Harkema, the direct supervisor, was not able to attend the Tribunal to corroborate Mr. Dionne’s assertions.

If a witness was unavailable and the employer wished to reschedule the Tribunal or continue it on another day those applications should have been made prior to the hearing or at the hearing.

Neither of those options was pursued by Zep and the purpose of a reconsideration is not to retry the matter but to determine if there was an error.

If the purpose of Ms. Harkema's evidence were to corroborate Mr. Dionne then there would have been no new evidence before the Adjudicator.

> 4. Ms. Fielding advised Ms. Hakema of her pregnancy 2 weeks after her start date of November 9, 1998, i.e. November 23, 1998 as opposed to early December as stated by Ms. Fielding. 'The Adjudicator, Kenneth Wm. Thornicroft, states that 'There is some evidence in the employer's own documents which suggests that MacKenzie (now Fielding) termination was related to her pregnancy." "there is a reference to MacKenzie leaving work early, and calling in sick on the other days, due to her pregnancy." The adjudicator has placed his own bias on this statement. Ms. Fielding stated many times to other employees that she "couldn't be fired because she was pregnant." The excessive sick time was proof of her taking advantage of the fact she was pregnant. Ms. Fielding's performance deteriorated significantly due to the fact she believed her position secure, in spite of her poor work performance, because she was pregnant. The adjudicator believed Ms. Fielding was dismissed based on her pregnancy despite documentation supporting poor work performance."

The Adjudicator made a number of findings in his analysis of the evidence before him. Based on sections 54 and 126(4)(b) of the Act he started out with the premise that the employer had the burden of proving that the employment was ended for a reason other than pregnancy. He relied on Tricom Services Inc., B.C.E.S.T. Decision No. 485/98. The burden is not on the employee to show her pregnancy was the cause of her employment ending.

Adjudicator Thornicroft pointed out that the delegate had determined that Zep did not have just cause for ending Ms. Fielding's employment and Zep had not appealed that finding for fact.

He went on at page 5:

> "However, the delegate also found that the employer had discharged its evidentiary burden of proving that MacKenzie's termination was not due to her pregnancy.
>
> In my view, when an employer has not shown that it had just cause to terminate a pregnant employee, the reasons advanced for the termination must be carefully scrutinized. Rarely, I expect, will an employer specifically advise an employee that she is being terminated because of her pregnancy--in most instances, some other reason will be advanced. The question that must be addressed, then, is whether or not the proffered reason for termination is merely a pretext. In the instant case, the employer states that it verbally warned MacKenzie on three occasions in January 1999 regarding poor work performance. These warnings are particularized in the "Performance Correction Notice" dated February 12th, 1999. MacKenzie denies having been so warned and, indeed, denies having been given the latter Notice.

The Adjudicator went on to make credibility finding against Mr. Dionne. He stated at page 6:

> "I find Dionne's evidence regarding the "Notice" to be improbable. If, as Dionne suggested, MacKenzie absolutely refused to discuss her poor work performance and refused to sign an acknowledgement regarding having been so informed, I would have expected some immediate disciplinary action (for insubordination) to have been taken--none was. Zep says that MacKenzie did not get along with her co-workers, used foul language in the workplace and was rude to customers but these assertions are not corroborated in any fashion. MacKenzie's direct supervisor, Ms. Harkema, likely would have been in a position to corroborate Dionne's assertions but she was not called as a witness. Since Harkema was MacKenzie's direct supervisor, the person who allegedly issued two of the three verbal warnings referred to in the Notice, and the person who actually carried out the termination, Harkema's failure to testify before me is all the more troublesome. I think it appropriate to draw an inference adverse to the employer for its failure to call Ms. Harkema as a witness.
>
> Zep says its original intention was not to terminate MacKenzie but simply to replace her on a temporary basis while she was on pregnancy leave. However, the advertisement that Zep placed in a local newspaper in mid-January 1999 (which clearly describes MacKenzie's position) did not advertise a temporary position; Zep sought a "team player to join our growing company". It should also be noted that the advertisement ran six months before MacKenzie's anticipated leave was begin in late July. The evidence suggests to me that Zep was looking to replace MacKenzie at least as early as mid-January 1999, well before any firm decision had been taken to discharge MacKenzie for "cause" in early March 1999.
>
> There is some evidence in the employer's own documents which suggests that MacKenzie's termination was related to her pregnancy. At page 4 of Ms. Harkema's March 4th, 1999 memorandum to Dionne--which apparently sets out the reasons for MacKenzie's termination--there is a reference to MacKenzie leaving work early, and calling in sick on other days, due to her pregnancy. In very next paragraph, Harkema justifies MacKenzie's termination on the basis that she is not a "team player" and "does not carry her own weight".
>
> The delegate appears to have been influenced by the fact that the other pregnant employee took leave and subsequently returned to work but, in fact, Zep now concedes that the other employee did not return to work although Zep maintains that was her own personal choice.

It is interesting to note Ms. Fielding's comment in her written submission that she did not learn that she was pregnant until she visited the doctor on December 1, 1999. She states she conceived on November 14, 1999. It is unlikely she told her supervisor she was pregnant on November 23, 1999 as Mr. Dionne's submission suggests.

It is also interesting that the first notation of poor performance was January 13, 2000, which coincides with the decision to put an advertisement in the paper for Ms. Fielding's position. Ms. Fielding's evidence before the Adjudicator and in her submission that Zep had made the decision

to replace her because she was pregnant is consistent with the conduct shown by this evidence. Ms. Fielding had left work at 4 PM on three occasions for maternity related medical appointments. She had been hospitalized in December for 3 days due to her pregnancy.

Zep interprets their complaints about Ms. Fielding's absences to be taking advantage of her pregnant condition and not performing. Ms. Fielding interprets these absences as related to her pregnancy. These issues as set out in Zep's issue number were before Adjudicator.

> 5. "The newspaper advertisement that Zep was looking to replace Ms. Fielding in mid-January is not evidence of termination due to pregnancy. When Ms. Fielding's position was advertised, it was two months before we found a candidate for the position. Many people were interviewed before a suitable candidate was found. Zep needed to be prepared to replace two temporary employees and needed sufficient time to train two people. In the event that one of the temporary persons was unable to handle the position another candidate would be needed. I fact Zep required two months before Ms. Fielding's maternity leave to prepare the new employee to take on the temporary position."

The employer refers to Ms. Fielding and her colleague who was also pregnant as 'temporary employees'. The Adjudicator found that Ms. Fielding intended to work until late July. She was at least 7 months not two from planning to leave her employment on maternity leave. The language in this submission supports Ms. Fielding's position before the Adjudicator and his findings of credibility.

This point also attempts to reargue the evidence that was fully before Adjudicator Thornicroft. He made findings about this evidence as being in support of the Employee's interpretation of the facts not the Employer's. After making this finding and considering the submissions Adjudicator Thornicroft concluded:

> "I am of the view that Zep has simply failed to discharge its evidentiary burden of proving that MacKenzie was not terminated because of her pregnancy. "

Zep has not discharged the burden of proof in this application for reconsideration. Zep has failed to raise any grounds for reconsidering the Decision. There is no evidence that there was a failure by an adjudicator to comply with principles of natural justice. The arguments submitted by Zep are not in relation to a mistake of fact but to an interpretation of the facts in evidence. It is for the adjudicator to interpret fact as presented and this was done in the Decision.

There is no suggestion that the Decision is inconsistent with other decisions not distinguishable on the facts nor is there a serious mistake in applying the law. There is no significant and serious new evidence offered for reconsideration, which has become available that had such evidence been presented to the adjudicator it would have lead the adjudicator to a different conclusion. Zep's submission does not suggest that there was a misunderstandings or failure to deal with a significant issue in the Decision or a clerical error in the Decision.

The appellant has not shown any error in fact or law in the Decision # D033/00.

Ms. Fielding has waited over a year for this matter to be resolved. Zep has not shown any error in fact or law.

ORDER

This Application is denied pursuant to Section 116 of the Act.

The Decision is confirmed. Zep is liable to Fielding for the amount of $8,800 plus the interest accrued in accordance with section 88 of the Act as determined by the Director.

April D. Katz
Adjudicator
Employment Standards Tribunal